IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7432 OF 2005

Sau Hirabai Ganpati Dorugade Petitioner

versus

Vithabai @ Anysuya Gopal @ Sopan Kasar and another Respondents

Mr.N.V.Bandiwadekar for petitioner.

Mr.P.R.Arjunwadkar for respondent no.1.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 15th February 2006

PC :

1. Heard Shri Bandiwadekar for the petitioner and Shri Arjunwadkar for first respondent. Shri Bandiwadekar states that respondent no.2 is served and an affidavit proving service is filed on record which is taken on record.

2. The petitioner-original plaintiff filed Regular Civil Suit No.17 of 1997 in the Court of Civil Judge, Junior Division, Ajara. In the said suit the principal relief is that the petitioner-plaintiff is entitled to half share in

the suit property and that the same be partitioned by meets and bounds and thereupon the petitioner be placed in physical possession thereof. When the suit was ripe for hearing and evidence was being recorded, an application for amendment has been made by the petitioner-plaintiff to incorporate an alternate plea as also to add third party as party defendant to the suit.

3. After noting objection thereto raised by the first respondent herein, the Trial Court has rejected the application for amendment.

4. The Trial Court has observed that as far as joinder of the third party is concerned, an issue is framed at the instance of the defendants that the suit is bad for non joinder of necessary party. The burden has been taken by the defendants upon themselves to prove this aspect of the matter. Unless and until that burden is discharged, there is no question of allowing an application for impleadment of third party. In the opinion of the Court below, as to whether third party is a necessary party or not, is yet to be decided, and, therefore, the application made is premature.

5. As far as incorporating other pleas are concerned, it appears that the defendants are asserting exclusive right, title and interest in the suit property on the basis of a will. The petitioner-plaintiff, therefore, by way of abandon precaution, seeks to incorporate plea with regard to this will and an alternate relief in the prayer clause.

6. With the assistance of learned advocates appearing for parties, I have perused the application for amendment, the objection thereto as also the order under challenge. As far as joinder of the third party is concerned, in my view, the observations of the Court below in the impugned order sufficiently protect the petitioner. The application in that behalf is rejected after holding that it is premature and unless and until the burden is discharged by the respondents-original defendants, there is no question of impleading the third party.

7. As far as plea with regard to will is concerned, in my view, the observations of the Court below do protect the petitioner-plaintiff as it records a specific plea of the petitioner-

plaintiff that no will is in existence. However, none would be prejudiced if the petitioner-plaintiff is allowed to incorporate a plea that assuming without admitting that such a will exists, the same does not prevent her from claiming any relief in the suit or that it is not binding on her. At this stage, when the assertion of the petitioner-plaintiff is being noted and an alternate plea is allowed to be incorporated, no prejudice would be caused to the respondents-original defendants. Therefore, the application for amendment can be allowed in part and in case the plea is incorporated and amendment is carried out with regard to the same, the respondents-original defendants would be at liberty to place an additional written statement.

8. Accordingly, application for amendment preferred by the petitioner-plaintiff (Exhibit-144) is allowed in part. Petitioner-plaintiff is allowed to incorporate paragraphs 3(a) and 3(b) and also incorporate following prayer :-

> "Without prejudice to prayer clauses (A), (B) and (C) and alternatively the will of Jyoti Mahadu Madav is illegal, invalid

and not binding upon the plaintiff."

9. Amendment to be carried out within a period of two weeks from today. However, the petitioner-plaintiff shall pay costs quantified at Rs.500/- (Rs.Five hundred only). Payment of costs condition precedent. Upon amendment being carried out and amended plaint being served on the respondents, liberty is granted to place an additional written statement within a period of four weeks from the date of receipt of a copy of the amended plaint. Costs to be paid to respondent no.1. The Trial Court then to proceed with the matter and dispose of the same expeditiously considering that the suit is filed in the year 1997. Petition disposed of in the above terms. Ad-interim order stands vacated.

(S.C.DHARMADHIKARI, J.)